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VIEWS

Communication No. 774/1997

Submitted by:	Mr. Robert Brok (deceased) and his surviving spouse Dagmar Brokova
Alleged victims:	The authors
State party:	The Czech Republic
Date of communication:	23 December 1996 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 22 October 1997 (not issued in document form)
Date of adoption of Views:	31 October 2001

[ANNEX]

* Made public by decision of the Committee.

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ANNEX*

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights**

- Seventy-third session -

Communication No. 774/1997

Submitted by:	Mr. Robert Brok (deceased) and his surviving spouse Dagmar Brokova
Alleged victims:	The author and his surviving spouse Dagmar Brokova
State party:	The Czech Republic
Date of communication:	23 December 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2001,

Having concluded its consideration of communication No. 774/1997, submitted to the Human Rights Committee by Mr. Robert Brok (deceased) and by his surviving spouse Dagmar Brokova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and by the State party,

Adopts the following:

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*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glélé Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

**The texts of one partly concurring, partly dissenting individual opinion signed by Committee member Martin Scheinin, and of two dissenting individual opinions signed by Committee members Mr. Nisuke Ando and Ms. Christine Chanet are appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The original author of the communication dated 23 December 1996, Robert Brok, was a Czech citizen, born in September 1916. When he passed away on 17 September 1997, his wife Dagmar Brokova maintained his communication. It is claimed that the Czech Republic has violated articles 6, 9, 14 (1), 26 and 27 of the Covenant. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.[a] The author is not represented by counsel.

The facts as submitted

2.1 Robert Brok's parents owned a house in the centre of Prague since 1927 (hereinafter called the property). During 1940 and 1941, the German authorities confiscated their property with retroactive effect to 16 March 1939, because the owners were Jewish. The property was then sold to the company Matador on 7 January 1942. The author himself, was deported by the Nazis, and returned to Prague on 16 May 1945, after having been released from a concentration camp. He was subsequently hospitalized until October 1945.

2.2 After the end of the war, on 19 May 1945, President Benes' Decree No. 5/1945, followed up later by Act 128/1946, declared null and void all property transactions effected under pressure of the occupation regime on the basis of racial or political persecution. National administration was imposed on all enemy assets. This included the author's parents' property pursuant to a decision taken by the Ministry of Industry on 2 August 1945. However, in February 1946, the Ministry of Industry annulled that decision. It also annulled the prior property confiscation and transfers, and the author's parents were reinstated as the rightful owners, in accordance with Benes Decree No. 5/1945.

2.3 However, the company Matador, which had been nationalized on 27 October 1945, appealed against this decision. On 7 August 1946, the Land Court in Prague annulled the return of the property to the author's parents and declared Matador to be the rightful owner. On 31 January 1947, the Supreme Court confirmed this decision. The Court found that since the company with all its possessions had been nationalized in accordance with Benes Decree No. 100/1945 of 24 October 1945, and since national property was excluded from the application of Benes Decree No. 5/1945, the Ministry had wrongfully restored the author's parents as the rightful owners. The property thereby stayed in possession of Matador, and was later, in 1954, transferred to the state company Technomat.

2.4 Following the change to a democratic government at the adoption of restitution legislation, the author applied for restitution under Act No. 87/1991 as amended by Act No. 116/1994. The said law provides restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime (25 February 1948 - 1 January 1990). The law also matter provisions for restitution or compensation to victims of racial persecution during the Second World War, who have an entitlement by virtue of Decree No. 5/1945. The courts (District Court decision 26 C 49/95 of 20 November 1995 and Prague City Court decision 13 Co 34/94-29 of 28 February 1996), however, rejected the author's claim. The District Court states in its decision that the amended Act extends the right to restitution to persons who lost their property during the German occupation and who could not have their property restituted because of political persecution, or who went through legal procedures that violated their human rights subsequent to 25 February 1948, on condition that they comply with the terms set forth in Act No. 87/1991. However, the court was of the opinion that the author was not eligible for restitution, because the property was nationalized before 25 February 1948, the

retroactive cut-off date for claims under Act No. 87/1991 Section 1, paragraph 1, and Section 6. This decision was confirmed by the Prague City Court.

2.5 Pursuant to section 72 of Act No. 182/1993, the author filed a complaint before the Constitutional court that his right to property had been violated. This provision allows an individual to file a complaint to the Constitutional Court if the public authority has violated the claimant's fundamental rights guaranteed by a constitutional law or by an international treaty in particular the right to property.

2.6 The Constitutional Court concluded that since the first and second instances had decided that the author was not the owner of the property, there were no property rights that could have been violated. In its decision, the Constitutional Court invoked the question of fair trial on its own motion and concluded that "*the legal proceedings were conducted correctly and all the legal regulations have been safeguarded*". Accordingly, the Constitutional Court rejected the author's constitutional complaint on 12 September 1996.

The complaint

3.1 The author alleges that the court decisions in this case are vitiated by discrimination and that the courts' negative interpretation of the facts is manifestly arbitrary and contrary to the law.

3.2 The author's widow contends that the Act No. 87/1991, amended by Act No. 116/1994, is not applied to all Czech citizens equally. She deems it obvious that Robert Brok met all the conditions for restitution set forth in the law, but contends that the Czech courts were not willing to apply these same criteria to his case, in violation of articles 14 paragraph 1 and 26 of the Covenant.

3.3 The author's widow contends that the decision by the Supreme Court in 1947 was contrary to the law, in particular Benes Decree No. 5/1945 and Act No. 128/1946, which annul all property transfers after 29 September 1938 taken for reasons of national, racial or political persecution. She points out that at the time that Benes Decree No. 5/1945 was issued (10 May 1945), the company Matador had not yet been nationalized and that the exclusion of restitution therefore did not apply.

3.4 The author's widow states that the Act No. 87/1991 amended by Act No. 116/1994 Section 3, paragraph 2 contains an exception to the time limitations and enables the author as entitled through Benes Decree No. 5/1945 to claim restitution. According to the author's widow, the intention of this exception is to allow restitution of property that was confiscated before 25 February 1948 owing to racial persecution, and especially to allow restitution of Jewish property.

3.5 The author's widow further claims that since the initial expropriations happened as part of genocide, the property should be restored regardless of the positive law in the Czech Republic. The author points to other European countries where confiscated Jewish properties are restituted to the rightful owners or to Jewish organizations if the owners could not be identified. Article 6 of the Covenant refers to obligations that arise from genocide. In the authors' opinion, the provision should not be limited to obligations arising from complainants killed in genocide, but also to those, like Robert Brok, who survived genocide. The refusal to restitute property thereby constitutes violation of article 6, paragraph 3, of the Covenant.

3.6 The Czech Republic has, according to the author's widow, systematically refused to return Jewish properties. She claims that since the Nazi expropriation targeted the Jewish community as a whole, the Czech Republic's policy of non-restitution also affects the whole group. As a result and for the reason of lacking economical basis, the Jewish community has not had the same opportunity to maintain its cultural life as others, and the Czech Republic has thereby violated their right under article 27 of the Covenant.

Observations by the State party

4.1 By note verbale of 16 October 2000, the State party objects to the admissibility of the communication. The grounds for the State party's objections are the following:

(1) It argues that the author invoked only the right to own property in the domestic procedure, and not the rights covered by the Covenant. Thus, the vindication of domestic remedies for Covenant rights are not engaged;

(2) The State party points out that the events complained of occurred prior to the entry into force of the Optional Protocol for the Czech Republic, when the property was subject to confiscation in the 1940s, and the communication is therefore inadmissible *ratione temporis*; and

(3) The State party notes that the communication concerns the right to own property, which is not covered by the Covenant, and the communication is therefore inadmissible *ratione materiae*.

4.2 The State party contends that the author on 19 February 1946 obtained restitution of his property on the basis of the Industry Ministry Decision No. II/2-7540/46 and not on the basis of the National Committee decision as empowered by Decree No. 5/1945. It further states that the procedure chosen by the author was inconsistent with the special legislation governing exemptions from national administration. In addition, the author's father did not avail himself of Decree No. 108/1945 that regulated the confiscation of enemy assets and the establishment of National Restoration Funds. He thereby waived enlarged avenues for appeals against dismissal of claims for exemptions from national administration, to the Ministry of Interior.

4.3 Furthermore, the State party contends that the author in his claim to the courts in 1995/1996 did not complain about discrimination nor challenge the handling of the case by the courts in 1946 and 1947.

4.4 The State party points out that in communication No. 670/1995 Schlosser v. the Czech Republic and in communication No. 669/1995 Malik v. the Czech Republic, the Committee concluded that the said legislation applied in these cases was not prima facie discriminatory within the meaning of article 26 of the Covenant merely because it did not compensate victims of injustices committed in the period before the Communist regime.

4.5 The State party contends that all formal restoration of title according to Decree No. 5/1945 was completed before 25 February 1948, whereas the Act No. 87/1991 as amended only covers restitution of property that was confiscated between 25 February 1948 and 1 January 1990.

Author's comments to State party's submission

5.1 By letter of 29 January 2001, the author's widow contends that the State party has not addressed her arguments concerning the amendment to Act No. 87/1991 by Act No. 116/1994, which she considers crucial for the evaluation of the case.

5.2 She further states that the property would never have become subject to nationalization if it were not for the prior transfer of the assets to the German Reich which was on racial basis, and therefore the decisions allowing nationalization were discriminatory. The author's widow concedes that the communication concerns a property right, but explains that the core of the violation is the element of discrimination and the denial of equality in contravention of articles 6, 14, 26 and 27 of the Covenant.

5.3 The author's widow further contends that the claim complies with the *ratione temporis* condition, since the claim relates to the decisions made by the Czech courts in 1995 and 1996.

5.4 With regard to the State party's claim that the author's father could have claimed the property pursuant to Act No. 128/1946 until 31 December 1949, the author's widow contends that the author's father had good reason to fear political persecution from the Communist regime after 25 February 1948. Moreover, the violations of the Communist regime are not before the Committee, but rather the ratification and continuation of those violations by the arbitrary denial of redress following the adoption of restitution legislation in the 1990s. The author's submission was transmitted to the State party on 7 February 2001. The State party, however, has not responded to the author's comments.

Examination of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee has noted the State party's objections to the admissibility and the author's comments thereon. It considers that the State party's allegations that the author has not met the *ratione temporis* condition for admissibility, is not relevant to the case, viewing that the author specifically noted that his claim relates to the decisions of the Czech courts in 1995 and 1996.

6.4 With regard to the State party's objections *ratione materiae*, the Committee notes that the author's communication does not invoke a violation of the right to property as such, but claims that he is denied a remedy in a discriminatory manner.

6.5 Furthermore, to the State party's objections that the communication is inadmissible for non-exhaustion of domestic remedies, the Committee notes that the facts raised in the present communication have been brought before the domestic courts of the State party in the several applications filed by the author, and have been considered by the State party's highest judicial authority. However, the issues relating to article 6, 9 and 27 appear not to have been raised before the domestic courts. The Committee considers that it is not precluded from considering

the remaining claims in the communication by the requirement contained in article 5, paragraph 2 (b), of the Optional Protocol.

6.6 In its inadmissibility decisions on communications No. 669/1995 Malik v. the Czech Republic and 670/1995 Schlosser v. the Czech Republic, the Committee held that the author there had failed to substantiate, for purposes of admissibility, that Act No. 87/1991 was prima facie discriminatory within the meaning of article 26. The Committee observes that in this case the late author and his widow have made extensive submissions and arguments which are more fully substantiated, thus bringing the case over the threshold of admissibility so that the issues must be examined on the merits. Moreover, the instant case is distinguishable from the above cases in that the amendment of Act No. 87/1991 by Act No. 116/1994 provides for an extension for a claim of restitution for those entitled under Benes Decree No. 5/1945. The non-application of this extension to the author's case raises issues under article 26, which should be examined on the merits.

6.7 The Committee finds that the author has failed to substantiate for purposes of admissibility his claims under articles 14, paragraph 1 of the Covenant. Thus, this part of the claim is inadmissible under article 2 of the Optional Protocol.

Examination of merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The question before the Committee is whether the application of Act No. 87/1991, as amended by Act No. 116/1994, to the author's case entails a violation of his right to equality before the law and to the equal protection of the law.

7.3 These laws provide restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime. The law also provides for restitution or compensation to victims of racial persecution during the Second World War who had an entitlement under Benes Decree No. 5/1945. The Committee observes that legislation must not discriminate among the victims of the prior confiscation to which it applies, since all victims are entitled to redress without arbitrary distinctions.

7.4 The Committee notes that Act No. 87/1991 as amended by Act No. 116/1994 gave rise to a restitution claim of the author which was denied on the ground that the nationalization that took place in 1946/47 on the basis of Benes Decree No. 100/1945 falls outside the scope of laws of 1991 and 1994. Thus, the author was excluded from the benefit of the restitution law although the Czech nationalization in 1946/47 could only be carried out because the author's property was confiscated by the Nazi authorities during the time of German occupation. In the Committee's view this discloses a discriminatory treatment of the author, compared to those individuals whose property was confiscated by Nazi authorities without being subjected, immediately after the war, to Czech nationalization and who, therefore, could benefit from the laws of 1991 and 1994. Irrespective of whether the arbitrariness in question was inherent in the law itself or whether it resulted from the application of the law by the courts of the State party, the Committee finds that the author was denied his right to equal protection of the law in violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it substantiate a violation of article 26 in conjunction with article 2 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. Such remedy should include restitution of the property or compensation, and appropriate compensation for the period during which the author and his widow were deprived of the property, starting on the date of the court decision of 20 November 1995 and ending on the date when the restitution has been completed. The State party should review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination in contravention of article 26 of the Covenant.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

Notes

[a] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendices

Individual opinion by Committee member Martin Scheinin
(partly concurring, partly dissenting)

While I concur with the main part in the Views of the Committee, I dissent as to the remedy proposed. As established by the Committee, the author was a victim of a violation of article 26 in that his claim for restitution of property was arbitrarily denied. This is the human rights violation suffered by the author after the entry into force of the Covenant and its Optional Protocol.

Whether the author is entitled to the restitution of his parent's property is an issue of domestic law. What the Covenant requires is that the domestic law and its application must be free of discrimination and must secure that any restitution claim is decided without discrimination and through a fair trial. Consequently, the proper remedy for the violation found by the Committee is that the State party secures to the author's widow a fresh possibility to have the restitution claim considered, without discrimination or arbitrariness and with all the guarantees of a fair trial if the matter cannot be decided without a judicial determination of the claim. If the State party fails to afford that remedy, for instance due to the unwillingness of its legislature to amend discriminatory laws, the alternative remedy is compensation for the discrimination the author suffered, duly taking into account the economic loss and moral suffering caused by the discrimination established by the Committee.

The case of *Des Fours Walderode,* decided by the Committee is to be distinguished from the present case because in that case the title had already been recognized before the State party, through retroactive and discriminatory legislation interfered in that recognition. Therefore the restitution of the property is the proper remedy in that case.

[Original: English]

Individual Opinion by Committee member Mr. Nisuke Ando (dissenting)

While I heartily sympathize with the situation in which the author found himself and his widow still finds herself with respect to the property in question, I am unable to share the Committee's Views finding a violation of article 26 of the Covenant in the present case. The relevant facts of the case as I see them are as follows:

During 1940 and 1941 a house in Prague owned by Mr. Brok's parents was confiscated by the German authorities then occupying Czechoslovakia because the owners were Jewish. In January 1942 the house was sold to the company Matador. In May 1945, after the end of the war, President Benes' Decree No. 5/1945 declared null and void all property transactions effected under the occupant's pressure on the basis of racial or political persecution, imposing national administration on all enemy assets. On 2 August 1945 the Ministry of Industry decided to include the house in question among the enemy assets, but on 19 February 1946 the Ministry reversed its decision and reinstated the author's parents as the rightful owners of the house. However, the company Matador, which had been nationalized with its all possessions in October 1945 under the Benes Decree No. 100/1945, appealed against the Ministry's decision, and on 7 August 1946 the Land Court in Prague annulled the return of the property to the author's parents and declared the company Matador as its rightful owner for the reason that the national property had been excluded from the application of Benes Decree No. 5/1945. On 31 January 1947 the Supreme Court confirmed this decision. (See paras. 2.1 and 2.3). The state party contends that the author's father did not avail himself of Decree No. 108/1945 (No. 126/1946) which regulated the confiscation of enemy assets and the establishment of National Restoration Fund, thereby waiving avenues for appeals against dismissal of claims for exemptions from national administration to the Ministry of Interior. (para. 5.1) It also contends that all formal restoration of title according to Benes Decree No. 5/1945 was completed before 25 January 1948. (para 5.4) Against these contentions the author's widow asserts that the author's father had good reason to fear political persecution from the Communist regime after 25 February 1948. (para. 6.4).

After the collapse of Communist regimes in Czechoslovakia Act No. 87/1991 as amended by Act No. 116/1994 was legislated, providing for restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime. The amendment refers to victims affected under Benes Decree No. 5/1945, but the Act applies only to "certain property losses and other injustices caused by civil and labour law provisions as well as by some administrative acts between the dates of 25 February 1948 and 1 January 1990". (Part One, Section One). The author applied for restitution of the property in question under the Act, but despite the author's widow's contention that the reference to victims affected under Benes Decree No. 5/1945 was to allow restitution of property which was confiscated before 25 February 1948 due to racial persecution (para. 3.3), the Czech courts (District Court and Prague City Court. See para. 2.4) as well as its Constitutional Court (para. 2.6) rejected the authors claim because the house had been confiscated before 25 February 1948, the retroactive cut-off date for claims under the Act.

As far as these facts are concerned, I consider it difficult to find any intent for discriminating a certain category of persons from others. Act No. 87/1991 as amended by Act. No. 116/1994 generally aims to mitigate the consequences of confiscation of private property under the Communist regime. As such it covers the period between 25 February 1948 and 1 January 1990. The author's widow asserts that the amendment is to allow restitution of property

confiscated before 25 February 1948, but the State party, contends that all formal restitution of title according to Benes Decree No. 5/1945 was completed before 25 January 1948. Moreover the "good reason to fear political persecution from the Communist regime after 25 February 1948" which the author's widow claims as having prevented her father from availing himself of possible remedies is not sufficiently specific to establish that he was unable to pursue them before 25 January 1948. It is unfortunate that the Act fails to recover the property, which belongs to the author and persons in similar situations. Nevertheless, since the Act is not intended to recover all and every property confiscated in the past on political or racial grounds, I consider it difficult to find a violation of article 26 of the Covenant in the present case.

[Original: English]

Individual Opinion by Committee member Ms. Christine Chanet (dissenting)

This decision by the Committee constitutes a break with the position taken by all international jurisdictions and upheld by the Committee thus far, namely the principle of subsidiarity with regard to the rule of non-exhaustion of domestic remedies.

In the case at hand, only the question of the right to property was raised in the domestic courts: at no time did the author of the communication submit a complaint to the courts alleging discrimination.

The decisions of the domestic courts that were transmitted to the Committee clearly show that the Committee is the first instance in which discrimination has been alleged.

Furthermore, by its decision the Committee is setting a disturbing precedent by taking the domestic courts to task for not automatically providing a means of action or defence to address the violation of a right guaranteed by the Covenant.

The Committee has also gone against its jurisprudence a third time by involving itself in the assessment of evidence by the domestic courts (para. 3.1).

Lastly, the Committee is substituting its own interpretation of the domestic law of a State for the interpretation recognized by the courts of that State; in so doing, the Committee is overstepping the bounds of its competence as defined by the Covenant and the Optional Protocol.

It is therefore to be hoped that this particular decision by the Committee will remain an isolated exception.

[Original: French]